Office - Supreme Court, U. S.
NOV 5 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 499.

FRANK TENNYSON NEELY,

Petitioner,

v.

MERCHANTS TRUST COMPANY OF RED BANK, NEW JERSEY, as Administrator of the ESTATE OF ELIZA A. S. CALEF, Deceased, and FREDERICK H. TARR, as Ancillary Administrator in the State of Massachusetts of the ESTATE OF ELIZA A. S. CALEF, Deceased, and MARY L. HODGKINS, HARRIET G. STACY, JAMES D. STACY, FANNY K. STACY, MARY S. STACY, ANNA S. LUFKIN, GILBERT C. McCORMICK, HARRY McCORMICK, LOLA ROBINSON, HETTIE M. MORSE, JENNIE M. SAYWARD, CLIFFORD E. STACY, FRED C. STACY, EVERETT STACY, WILLIAM A. HAMILTON, DORIS ALVORD, ALBERT J. McCORMICK,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

THEODORE D. PARSONS,
FRANK F. GROFF,
Counsel for Respondents.

Adams Press, 142 Liberty St., N. Y. City, COrtandt 7-3156

INDEX.

PAGE

Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit 1

Opinions Below 1

Grounds Upon Which the Petitioner Invokes the Jurisdiction of this Court 2

Statement 3

Argument 9

I. The present case presents no issues which warrant a review of this cause by this Court 9

II. No judicial admission of the existence of a contract is present 12

III. An enforceable agreement setting forth with precision the terms, consideration and mutuality was not proven 15

IV. The petitioner by his failure to perform the alleged contract has barred himself from any relief 23

V. The existence of the contract was in issue and was properly determined in the Courts below 26

PAGE

VI. The petitioner failed to prove that a refusal to enforce the alleged contract would work a fraud upon him, and that the services rendered were not compensable in a suit at law and so was not entitled to relief 29

VII. In an action to prove a parol contract of a decedent, clear and convincing proof of the existence and performance is required 35

VIII. Conclusion 38

Appendix 40

Excerpts From the Opinion of Vice Ordinary Maja Leon Berry, of the New Jersey Prerogative Court, Rendered in re Calef, 109 N. J. Eq. 181 40

Opinion of United States District Court Judge Fake 49

Excerpts From Report of Special Master Appointed by District Court Judge Fake 51

Opinion of Circuit Court of Appeals for the Third Circuit, October Term, 1939 55

Excerpts From New Jersey Revised Statutes 60

TABLE OF CASES CITED.

PAGES

Acquackanonk Building and Loan Association v. Parsonnet, 107 N. J. Eq. 48; 151 Atl. 865 24

Barry v. Ruskin, 99 N. J. Eq. 730; 133 Atl. 528 24

B. & B. Inv. Co., Inc. v. Kaufman, et al., 100 N. J. Eq. 411; 136 Atl. 186 24

Beaver v. Crump, 76 Miss. 34; 23 So. 432 22

Beck v. Occidental Life Insurance Co., 95 F. (2nd) 935 .. 28

Boulanger v. Churchill, 86 N. J. Eq. 96; 97 Atl. 947 30

Bredow v. Woll (Conn.), 149 Atl. 772 14

Brooks v. Yarbrough, 37 F. (2nd) 527 11

Burdick v. Grimshaw, 113 N. J. Eq. 591; 168 Atl. 186 36

Cadigan v. Crabtee (Mass.), 78 N. E. 412 14

City of Newark v. Lindsley, 114 Atl. 794 (not officially reported) 24

Cochrane v. McEntee, 51 Atl. 279 (N. J. Chancery) (not officially reported) 31

Cooper v. Carlisle, 17 N. J. Eq. 525 (not in Atlantic Reporter) 16, 21, 38

Cooper v. Colson, 66 N. J. Eq. 328; 58 Atl. 337 ..... 16, 21, 29, 31, 38

Danenhauer v. Danenhauer, 105 N. J. Eq. 449; 148 Atl. 390 ..... 25, 33

Erie R. R. Co. v. Tompkins, 304 U. S. 64; 82 L. Ed. 1188.. 11

Friedlander v. Lehr, 99 N. J. Eq. 680; 134 Atl. 316 24

Gifford v. Barber, 74 N. J. Eq. 352; 70 Atl. 371 24

Haberman v. Kaufer, 70 N. J. Eq. 381; 61 Atl. 976 ..... 16, 38

Habirshaw Electrical Cable Company v. Habirshaw, et al., 296 Fed. 875 14

In re Calef, 109 N. J. Eq. 181; 156 Atl. 475; affd. 111 N. J. Eq. 355; 162 Atl. 579; certiorari denied, 288 U. S. 606; 77 L. Ed. 981 2

PAGES

Johnson v. Wehrle, 9 N. J. Misc. 939; 156 Atl. 229 ...16, 32, 38

Kastell v. Hillman, 53 N. J. Eq. 49 19
Kohbrin v. Drazin, 97 N. J. Eq. 400; 128 Atl. 796 24
Kutschinski, et al., v. Thompson, et al., 101 N. J. Eq. 649; 138 Atl. 569 24

Laune v. Chandless, 99 N. J. Eq. 186; 131 Atl. 634 ...16, 19, 38
Lings v. Urquhart, 106 N. J. E. 506; 151 Atl. 391; affd. 109 N. J. Eq. 131, 156 Atl. 377 .....16, 33

McNamara v. Bohn, 108 Atl. 764 (N. J. Chancery) (not officially reported) 16, 38
McTague v. Finnegan, 54 N. J. Eq. 454, at page 461, 35 Atl. 542 .....16, 38
Merlis v. G. & M. Corporation, 143 Atl. 139 (N. J. Chancery) (not officially reported) 24
Messenger v. Anderson, 225 U. S. 436, 36 L. Ed. 1153 28

Neely v. Stacy, et al., 288 U. S. 606, 77 L. Ed. 981 2

Pileggi v. Thorn, 100 N. J. Eq. 585, 135 Atl. 796 24

Scott v. Beola, 111 N. J. Eq. 215; 161 Atl. 822 .....16, 38
Sichterman v. R. M. Hollingshead Company (Calif.), 4 Pac. (2d) 181 14

Thommessen v. Absecan Land Co., 98 N. J. Eq. 696; 130 Atl. 518 24

Veazey's Case, 80 N. J. Eq. 466; 85 Atl. 176 (New Jersey Court of Errors and Appeals) 12
Vreeland v. Vreeland, 53 N. J. Eq. 387; 32 Atl. 3 .....16, 20, 38

Weyer v. Weyer, 106 N. J. Eq. 112; 150 Atl. 232 .....16, 38
Wood v. Graves (Mass.), 11 N. E. 567 14

STATUTE CITED.

PAGES

N. J. R. S. 2:97-2 ..... 4, 12

COURT RULES CITED.

Federal Rules of Civil Procedure, Rule 26 (d) (3) 4

Rules of the Supreme Court, Rule 38, paragraph 5 (b) 10

OTHER AUTHORITIES.

Corpus Juris, Volume 58, page 1065, Section 316 23

Corpus Juris, Volume 64, page 1266, Section 1127 27

Wigmore on Evidence, Second Edition, Vol. 5, Section 2588 13

Wigmore on Evidence, 1923 Edition, Section 2590 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 499.

FRANK TENNYSON NEELY,

Petitioner,

vs.

MERCHANTS TRUST COMPANY OF RED BANK, NEW JERSEY, as Administrator of the ESTATE OF ELIZA A. S. CALEF, Deceased, and FREDERICK H. TARR, as Ancillary Administrator in the State of Massachusetts of the ESTATE OF ELIZA A. S. CALEF, Deceased, and MARY L. HODGKINS, HARRIET G. STACY, JAMES D. STACY, FANNY K. STACY, MARY S. STACY, ANNA S. LUFKIN, GILBERT C. MCCORMICK, HARRY MCCORMICK, LOLA ROBINSON, HETTIE M. MORSE, JENNIE M. SAYWARD, CLIFFORD E. STACY, FRED C. STACY, EVERETT STACY, WILLIAM A. HAMILTON, DORIS ALVORD, ALBERT J. MCCORMICK,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

The opinion of the United States District Court for the District of New Jersey dismissing the bill of complaint is set forth at page 1588 of the Record below and is reported

in 26 F. Supp. 130. The opinion of the Circuit Court of Appeals affirming the judgment of the District Court is set forth at page 1729 of the Supplemental Record and is reported in 113 F. (2nd) 953. This cause is intertwined with and involves parties to "In Re Calef", 109 Equity 181, in which the decision ran against the present petitioner. The New Jersey Court of Errors and Appeals affirmed that case in 111 N. J. Eq. 355. This Court denied certiorari in Neely v. Stacy, et al., 288 U. S. 606.

GROUNDS UPON WHICH THE PETITIONER INVOKES THE JURISDICTION OF THIS COURT.

From the petition filed, confusion exists upon what specific grounds the petitioner invokes the jurisdiction of this Court to grant the writ for which he sues. Apparently the grounds are as follows:

1. That the decision of the Circuit Court is contrary to the decisions of this Court and of the New Jersey Courts, in holding that the contract was not judicially admitted but was an issue;

2. That the decision of the Circuit Court of Appeals was contrary to the decision of the State Courts and District Courts, in holding that the terms of the contract had not been proven precisely either by a will or other proof;

3. That the Circuit Court of Appeals decided contrary to the existing law that it could examine the adequacy of the consideration for the promise;

4. That the Circuit Court of Appeals by its opinion determined, contrary to the rules of other Circuit Courts, that an order denying the contract established the law of the case;

5. That the Circuit Court of Appeals in its opinion enunciated a contrary rule of law to that in other Circuit Courts of Appeals, when it held that petitioner was not entitled to a decree;

6. That the Circuit Court of Appeals enunciated in its opinion a rule of law which deprived the petitioner of due process of law, held that the petitioner had not established his case by clear and convincing evidence.

The statement of the case which follows hereafter disposes of each and every ground written down by the petitioner. In the petition and argument as contained in the moving papers, it is extremely difficult to determine upon what grounds the petitioner has written down the six reasons set forth. A review of the statement will, however, it is submitted, conclusively dispose of each ground.

STATEMENT.

The statement contained in the petition does not present an accurate, comprehensive or fair picture of the case in the lower Courts as developed under the evidence adduced. Indeed, a study of the petitioner's statement in conjunction with the opinions of Vice Ordinary Berry of the New Jersey Prerogative Court, Judge Fake of the District Court and Circuit Court Judge Biggs of the Circuit Court of Appeals compels a pause to determine whether the opinions discuss the same case as the statement.

Repeated references are made to that portion of the record in which are printed the depositions of Neely taken at Boston (R. 1159 to 1508). These depositions were taken in June, 1936, prior to the time of the trial. Neely himself appeared at the trial (R. 372). In the Boston depositions, Neely's counsel disregarded the provisions of the Evidence Act of New Jersey, which closes the mouth of

a party to an action who is attempting to prove a contract against a decedent's estate, N. J. R. S. 2:97-2. The Boston depositions are cited repeatedly as authority for statements of the petitioner. Neither the Federal District Court nor the Circuit Court of Appeals relied upon this deposition which was admitted by the Trial Judge (R. 1156 to R. 1159), in view of Federal Rules of Civil Procedure, Rule 26(d) (3), (erroneously stated by petitioner in the record to be Equity Rule Five (5) of this Court), which had been promulgated after the depositions had been taken. Practically every reference to the Boston depositions which is made by the petitioner is to portions which clearly contravene the New Jersey Statute.

The petitioner Neely was introduced to the decedent Mrs. Calef, by one Mrs. Clark when Neely was selling furs (R. 139). Neely's career prior to his introduction to Mrs. Calef was devious, dubious and questionable. He had been engaged in a publishing business for some period of time which wound up in bankruptcy in 1899 (R. 476). He then entered a manufacturing business which likewise ended in the bankruptcy court (R. 477), and finally filed his third petition in bankruptcy in 1917, three years before he was introduced to Mrs. Calef (R. 478). Neely established himself in Mrs. Calef's home, and by September, 1921 had obtained from Mrs. Calef a deed for her property (R. 426); had caused her to execute a will in his favor (R. 67); and in October procured a power of attorney which he used to close out her bank account and transfer the funds to his personal account. Neely continued to reside with Mrs. Calef until her death (R. 383). During her lifetime, Neely's sole occupation was principally stock speculation, either with securities or monies which belonged to Mrs. Calef (R. 1123). Mrs. Calef became ill and died in 1929. During this illness of Mrs. Calef, Neely systematically closed out the joint brokerage accounts and deposited the assets amounting to $50,000.00 in his own personal bank account. While Mrs. Calef lay on her death bed, Neely called Judge Truax

and asked him to draw a will for Mrs. Calef, who, at the time, was unconscious (R. 507 to 512). Another nurse saw the will which had been drawn, leaving everything to Neely. Neely requested this nurse to call him if Mrs. Calef became conscious, so she could sign a paper (R. 506). Neely, the very morning that Mrs. Calef died, called in another lawyer (R. 626).

Neely had claimed by his bill of complaint that the decedent had entered into a contract with him whereby in consideration of his acting as a business agent and manager of her affairs, Mrs. Calef had agreed to make him the residuary legatee of her estate, after certain bequests. In an endeavor to prove the existence of such a contract, certain witnesses (Hume, R. 66; Avery, R. 148; Willcox, R. 194; Warner, R. 290; Greer, R. 353; Clark, R. 110 and R. 692; Cochran, R. 655) were called to testify as to certain conversations they had with Mrs. Calef. No witness was able to testify as to any precise or definite contract. All had heard expressions of appreciation on the part of Mrs. Calef. Typical of their testimony is that of Avery who testified concerning a conversation with Mrs. Calef:

> "Q. Was it anything more than a sentimental desire to make a gift? Was it anything more than an expression of a grateful heart for services rendered? A. It was certainly that.
>
> Q. And that is as far as you can go with it? A. I am afraid I can't go any further than that because that was not the subject we were talking about, Mr. Neely. We were talking about her immediate future" (R. 183).

Neely himself wrote a letter during the very period of time he claimed that contract was in existence in which letter he stated, **"I am acting solely on behalf of Mrs. Calef and have made no charges of any kind against her for my services"** (R. 614; 1969-1970). The property which he re-

ceived by deed from Mrs. Calef was returned to her by his deed (R. 618-619; 1978). Monies which he claimed that he had paid on behalf of Mrs. Calef, he admitted by letter were repaid to him by her (R. 623; 1981). During the period of time which Neely claimed this contract was in existence, he gave to Mrs. Calef a note certifying that he had received from her $12,000.00, to be used in stock speculation and $5,000.00 for speculation in Florida, which money he agreed to pay back at the rate of $500.00 a month (R. 1044; 1897). He wrote numerous letters which indicated that there was no obligation on the part of Mrs. Calef to himself.

Many witnesses appeared for the defendants (Howland, R. 478; Dietz, R. 517; Johnson, R. 549; Bloxom, R. 590; Sweeney, R. 633; Reed, R. 563; Retaliatta, R. 532). Johnson, Vice President of a bank where Neely was negotiating a loan for Mrs. Calef, testified that he asked Neeley what his relationship with Mrs. Calef was. Johnson asked him,

> "How do you get paid?"

Neely replied,

> "I am doing this, then, if it is successful, I then rely on the generosity of the woman or whoever I do it for.
>
> "By the Court:
>
> "And did he say that in this particular instance, with reference to the relations of Mrs. Calef, that he was relying simply on her generosity? A. Yes, he was doing the same for her as he had done for Mrs. Soper (Mrs. Clark)" (R. 555).

At the close of the trial as the last witness, defendants offered an accountant who had examined the brokerage accounts of Mrs. Calef and Neely (R. 703 to 735). As a re-

sult of his testimony, the Trial Judge ordered a reference, wherein Neely was directed to render a full and complete account of all the monies and securities of Mrs. Calef which came into his hands or control. After voluminous testimony, the Master found that Neely had not accounted for $41,000.00 of funds of Mrs. Calef which reached his hands (R. 1137). Excerpts from the Master's report are set forth in the appendix to this brief. Neely has appeared personally and given his testimony before Vice Ordinary Berry of the New Jersey Prerogative Court, before Judge Fake of the District Court and before Special Master Fairlie in the Reference ordered by Judge Fake. Excerpts from their opinions are set forth in the appendix for the convenience of this Court.

Suffice it to say in this statement that Neely at the time that he met Mrs. Calef had been through bankruptcy three times; that he had no visible assets; that shortly thereafter he procured a deed, a power of attorney and a will from Mrs. Calef; that he gave her a note evidencing the receipt by him of $17,000.00 of her money, though he insisted throughout that she was impoverished and poor. He claimed that she had made a contract to will to him her residuary estate, in return for his management of her affairs. He admittedly occupied a position of trust and confidence. He neither accounted for nor showed payment to his benefactress of the $17,000.00 he admittedly received. As she lay dying, he caused a lawyer to draw a will naming him the sole beneficiary. He stood by while his friend, the seamstress, requested a nurse to guide the unconscious hand of Mrs. Calef in a signature to that will. He besought the aid of the wife of the attending physician to influence Mrs. Calef to make a will in his favor. He sought the aid of lawyers to procure the execution of a will. No witness stated definitely that Mrs. Calef had confirmed any precise agreement or arrangement with Neely. Other witnesses quoted her words which substantiated the statement that she never made any such contract.

Neely, even if such a contract had been made, did not perform his obligation under such alleged contract. Under his own signature, he admittedly received $17,000.00 for which he did not account. Through the medium of accountants and examination of the records of banks and brokerage houses, there was traced into Neely's hands before the death of his benefactress $50,000.00 of her funds. Even if such a contract had existed, his complete failure to faithfully perform such a contract which would entitle him to the aid of a court of equity is fully proven.

One other point arises. At an early stage of this litigation, the petitioner moved to strike from the answer, the denial of the existence of the contract (R. 31). This motion was based upon statements contained in a brief in the action instituted by Neely to probate a paper writing as a copy of the lost will. The Court granted this motion (R. 35-36). At the trial the petitioner, of course, bore the burden of proving his case and proceeded voluntarily to offer proof of the alleged contract and its performance. Without objection, the defendants offered proof of the nonexistence of such contract. During the course of the trial, on a motion, the Trial Judge stated that he would reconsider the order made. Briefs were submitted, and the Trial Judge stated that he would incorporate his ruling in the opinion (R. 1556 to R. 1558). The point was again brought up (R. 1572 to R. 1579) wherein the Court stated, "I held it to the end of the case, didn't I?". Again (R. 1633) after the decision of the Court, the argument was brought up, and the Court held that he had concluded the question in his opinion. The Court said, "I found that the evidence was not sufficient" (R. 1636). After all the arguments, the amended findings of fact were entered (R. 1702 to R. 1706). In the amended findings of fact, the Trial Court found:

> "No contract was entered into between the plaintiff and the defendant on or about September 10, 1921,

> or at any other time, setting forth definite terms or conditions of employment, specifying any particular service to be rendered on the part of the plaintiff and on the part of the defendant specifying with what consideration the decedent was to pay the plaintiff".

The record is clear that the Trial Court reversed himself upon the order directed to the answer. Under the opinion of the Trial Court, however, such action was not necessary since the Trial Court found as a fact that there was no contract setting forth definite terms or conditions of employment, specifying particular services to be rendered by the plaintiff, or specifying particularly the consideration (R. 1704). The Trial Court further found as a fact that the plaintiff rendered his services in reliance upon the generosity of Mrs. Calef, and for the privilege of using the latter's funds in speculation. These findings of fact are incorporated in the opinion (R. 1589 to 1590). The Trial Court concluded:

> "It therefore appears that even if Mrs. Calef did enter into an agreement, as alleged, with Neely, he has not performed the terms and conditions thereof, with which he was burdened" (R. 1590).

ARGUMENT.

I.

THE PRESENT CASE PRESENTS NO ISSUES WHICH WARRANT A REVIEW OF THIS CAUSE BY THIS COURT.

Petitioner herein alleged that the decedent entered into a contract, in which she agreed to leave to him the residue of her estate after certain bequests, in return for his promise to perform certain services. He says that in reliance

upon that promise, he performed those services. The decedent left no will, and the petitioner filed this suit for relief in the nature of specific performance. In the previous proceeding, as will appear by the record of this Court, when the petitioner attempted to probate a carbon copy of this will, he laid his residence in the State of New Jersey, and it was a peculiarly local affair, of which the Federal Courts had no jurisdiction. After this Court had denied his petition for a writ of certiorari, he laid his residence in New York, and brought the present suit. His motives remain the same. He is still attempting to enrich himself with the assets of the estate of his benefactress. The estate is still subject to the jurisdiction of the Prerogative Court of the State of New Jersey. The alleged transaction, upon which the petitioner relies, took place in New Jersey. No Federal questions arise. It is peculiarly local in character, and it is submitted it is governed by the State decisions. The reports of New Jersey are replete with decisions which have enunciated a well settled and clearly defined doctrine of law applicable to similar facts.

By Paragraph 5 of its Rule 38, this Court has stated that a review on writ of certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor. The statement in petitioner's moving papers contains no special nor important reason why a writ should be granted.

Under subdivision B of Section 5 of this rule, further instances are mentioned where the decision of a Circuit Court of Appeals may be reviewed. It is submitted that in the instant case, the decision of the Circuit Court of Appeals is in direct accord with the State decisions. This is evidenced by the citation in the opinion of the Circuit Court of leading decisions of the Courts of the State of New Jersey. No Federal question is involved. It is true that the petitioner has urged that the Circuit Court of Appeals, in its decision, has decided questions at variance with the decisions of other Circuits. It is submitted, that

in the instant case, this is immaterial since the question is peculiarly local in character. However, every case cited by the petitioner in his brief has been examined and the respondents are unable on an examination of these cases to find any decision of a Circuit Court of Appeals which is in conflict with the present decision. Indeed, the petitioner has cited cases which are in direct accord with the decision, review of which is sought.

In *Brooks* v. *Yarbrough*, 37 F. (2d) 527, from the 10th Circuit, cited several times by the petitioner, the Court uses the identical words so prevalent in the jurisdiction of New Jersey, holding that to sustain such an oral contract, the evidence "must be clear, satisfactory and convincing, and must establish a contract beyond a reasonable doubt."

This Court has held that, in such instances, the local law should be followed.

> *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188.

The very evil which the last cited case pointed out is present in the instant case. After Neely had failed in his effort in the Courts of New Jersey to probate the will, he removed himself to New York and instituted his action in the United States District Court.

This Court, in Erie R. R. Co. v. Tompkins, supra, stated, at page 76, as follows:

> "Through this jurisdiction, individual citizens willing to remove from their own state and become citizens of another might avail themselves of the Federal rule."

Justice Brandeis, in his opinion (p. 78), further says:

> "The law to be applied in any case is the law of the State, and whether the law of a State shall be declared by its legislature in a statute, or by its highest court in a decision is not a matter of Federal concern. There is no Federal general common law".

From the statement of the facts presented heretofore, it must be apparent that this case involves peculiarly local law. The decision of the Circuit Court of Appeals was in strict accord with the local law.

It is respectfully submitted that nowhere in the record is there a determination of any question in the case which is repugnant to the controlling decisions of the Courts of New Jersey. The opinion of the Circuit Court of Appeals on its face not only follows the local law but is grounded upon leading decisions of the local Courts.

II.

NO JUDICIAL ADMISSION OF THE EXISTENCE OF A CONTRACT IS PRESENT.

Under the first specification of errors, the petitioner charges that the Circuit Court of Appeals refused to hold in accordance with the decision of this Court and of the New Jersey Court that the contract had been judicially admitted. This argument is based upon the fact that in the previous attempt of this petitioner to probate a carbon copy of the will of 1921, the heirs in their brief filed with the Court of Errors and Appeals reviewed the evidence and made certain assumptions. Circuit Court Judge Briggs in his opinion succinctly and forcibly disposed of this contention. (Supplemental Record, p. 1732.)

The character of the proceedings to probate as a lost will, permitted testimony by the proponent. N. J. R. S. 2:97-2 is not applicable in such proceedings (Veazey's case, 88 N. J. Eq. 46, 85 Atl. 176). The action of the Prerogative Court was a judicial inquiry to determine if Mrs. Calef had left a valid will. There it had been possible for Neely to testify at length as to conversations and transactions with the decedent. When Neely's attempt to probate this carbon copy proved abortive, he appealed to the New Jersey Court of Errors and Appeals. The respondents therein, through present counsel, filed the brief in which the evidence of Neely was reviewed and certain conclusions

drawn therefrom. These arguments in the brief were based entirely upon evidence which was inadmissible in the present case. The arguments were directed to an entirely different issue, the existence or not of a will. The existence of a contract was not in issue. Neely's lips were not closed as to this evidence.

Statements in a brief, it is respectfully submitted cannot be construed as judicial admissions. Professor Wigmore, in his work on evidence, defines a judicial admission as "an express waiver made in Court or preparatory to trial by the party or his attorney conceding, for the purposes of the trial, the truth of some alleged fact" (Wigmore on Evidence, Second Edition, Vol. 5, Section 2588). Statements in a brief on appeal do not meet the tests of this distinction as set forth by Professor Wigmore. Statements are made for trial and not in arguendo after trial. The statements are based upon premises which are non-existent in the present case. The statements were not made for the purpose of admitting a contested and controverted fact but as a premise for the legal argument. The testimony of Neely in the Prerogative Court had been evasive, contradictory and unbelievable.

Vice-Ordinary Berry had described the evidence of the petitioner before him thus:

> "Neely's testimony, considered in connection with his affidavit filed in support of the petition for probate, is so inconsistent, shifty and evasive that I regard it as almost totally unreliable" (109 N. J. E. 181, 189).

Searching among his numerous contradictions and evasions, an attempt was made to formulate certain factual conclusions upon which the legal argument could be made. In presenting the legal argument, inferences from Neely's evidence were submitted.

Counsel, in his argument before the Prerogative Court and the New Jersey Court of Errors and Appeals referred

to this testimony which was clearly inadmissible in the present proceedings.

These statements in the briefs cannot be construed to be judicial admissions on the part of the present defendants. It has been uniformly held that such arguments and discussions of evidence before appellate tribunals do not constitute judicial admissions in any sense of the word. Bredow v. Woll (Conn.), 149 Atl. 772 and the cases cited therein; Wood v. Graves (Mass.), 11 N. E. 567; Cadigan v. Crabtree (Mass.), 78 N. E. 412. Likewise in Sichterman v. R. M. Hollingshead Company (Calif.), 4 Pac. (2nd) 181, the verdict rendered in the first trial had been appealed. In the second trial the defendant endeavored to offer certain statements which were contained in the plaintiff's brief on the appeal from the first trial. The trial Court overruled the offer and the Supreme Court upheld this action with a statement that:

> "It was but the conclusion of counsel and not an admission during the trial of a cause which would preclude the plaintiff from offering new and additional testimony upon the occasion of a second trial."

In Habirshaw Electrical Cable Company v. Habirshaw, et al., 296 Fed. 875, an appeal was taken from an order in the Court below. One of the questions on appeal was urged to be moot because of statements made by counsel at the trial below. In holding to the contrary Circuit Judge Mayer of the Second Circuit said:

> "In addition to other reasons in this record which dispose of such a contention, we take notice of it because to agree with it would be to introduce a dangerous doctrine. It is important that in matters of this character counsel should have full freedom of discussion before the court. The opinion of counsel, whether expressed thoughtfully or casually, cannot be con-

> strued into admission of a fact, and, if counsel had not the opportunity of expressing their views frankly and freely, the court (and the parties) would be deprived of a complete understanding of the meaning and consequences of its decision. Counsel cannot bind clients in this way and plainly such a situation is entirely foreign to one where a fact is admitted or conceded. The rule, as stated by Wigmore, Sec. 2590, 1923 edition (and we italicize 'fact') is: 'The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it, that is, the prohibition of any further dispute of the *fact* by him, and of any use of evidence to disapprove or contradict it.''

A thorough search of the authorities reveal no decision holding that in a distinct and separate cause of action a statement in a brief in another cause of action is a judicial admission of a contested fact.

In the instant case there was certainly no judicial admission. The Trial Court properly reversed its prior ruling. His action in so doing was approved by the Circuit Court of Appeals. The petitioner in his brief cites no authorities which hold that the action of the Trial Court or of the Circuit Court of Appeals, in determining that statements in a brief on appeal in a separate and distinct cause of action do not constitute a judicial admission in a later law suit involving different issues and additional parties, was incorrect.

III.

AN ENFORCEABLE AGREEMENT SETTING FORTH WITH PRECISION THE TERMS, CONSIDERATION AND MUTUALITY WAS NOT PROVEN.

The petitioner urges that the Circuit Court of Appeals erred when it found that the contract terms were not precisely established and in so doing followed a rule of law

which was contrary to the determinations of the State and District Courts. The Circuit Court of Appeals concluded:

> "* * * We conclude as did the learned District Judge that the appellant failed to sustain that burden of proof necessary to prove the existence of the contract between himself and Mrs. Calef" (Supp. Record 1731).

The decision of the Trial Court and of the Circuit Court of Appeals was in direct accord with the decisions of the jurisdiction of New Jersey. In *Cooper* v. *Carlisle*, 17 N. J. Eq. 525, Chancellor Zabriskie of the Court of Errors and Appeals said:

> "The contract proved must be clear, definite and certain both as to its terms and subject matter."

This pronouncement is followed with unanimity in a long line of cases.

Vreeland v. *Vreeland*, 53 N. J. Eq. 387; 32 Atl. 3.
McTague v. *Finnegan*, 54 N. J. Eq. 454; 35 Atl. 542.
Cooper v. *Colson*, 66 N. J. Eq. 328; 58 Atl. 337.
Haberman v. *Kaufer*, 70 N. J. Eq. 381; 61 Atl. 976.
Laune v. *Chandless*, 99 N. J. Eq. 186; 131 Atl. 634.
Weyer v. *Weyer*, 106 N. J. Eq. 112; 150 Atl. 232.
Lings v. *Urquhart*, 106 N. J. Eq. 506; 151 Atl. 391; affirmed 109 N. J. Eq. 131; 156 Atl. 377.
Scott v. *Beola*, 111 N. J. Eq. 215; 161 Atl. 822.
Johnson v. *Wehrle*, 9 N. J. Misc. 939; 156 Atl. 229.
McNamara v. *Bohn*, 108 Atl. 764.

The petitioner, when he filed this suit, asserted in the fifth paragraph of the bill of complaint that the petitioner and the decedent had agreed that in consideration of the services and assistance rendered to the decedent, and there-

after to be rendered, in the managment and care of her affairs, that she, the decedent, would make the petitioner her residuary legatee after provisions for certain legacies (R. 11). In accordance with the settled doctrine of the jurisdiction of New Jersey as declared in the foregoing decisions, it became encumbent upon the plaintiff to prove with precision the terms of this agreement by clear and convincing evidence.

As has been stated before, the plaintiff's lips by reason of the statute were closed. He was thus relegated to the testimony of third parties. Four witnesses: Clark (R. 694); Warner (R. 290); Greer (R. 535), and Cochran (R. 655) gave some testimony concerning a purported agreement. This testimony was nebulous, indefinite and uncertain. Greer said that Mrs. Calef had told him that "she had agreed with him and had made her will" (R. 353). Cochran said that Mrs. Calef had told her that she had an agreement with Neely to manage her affairs and she in turn had made her will giving him all her property (R. 675). Other witnesses: Avery (R. 193); Hume (R. 202), and Williams (R. 212), though they talked with Mrs. Calef, could only say that her expressions were those of gratitude.

As against this testimony there was the positive and definite testimony of Howland (R. 486); Johnson (R. 555); Dietz (R. 522); Bloxom (R. 596), together with the massive testimony of the witnesses who knew of certain events immediately prior and immediately succeeding the death of Mrs. Calef. As said by the Circuit Court, these events clearly indicated that the plaintiff knew that there was no contract and that he had no rights or claims against Mrs. Calef.

The petitioner in his brief is guilty of quoting half truths and distorting the evidence. When the evidence from the petitioner's own mouth and from his hands is considered, it is apparent that there was no contract. Petitioner, in this application, also relies upon the carbon copy of the will which has been heretofore rejected in this Court in

the denial of the writ of certiorari in 1933. The will (R. 1721 et seq.) is dated September 29th, 1921 and under the second paragraph recited as follows:

> "Second: All the rest, residue and remainder of my estate, real, personal or mixed of which I shall die seized or possessed, I give, devise and bequeath to my friend, F. Tennyson Neely of the City, County and State of New York in return for his services rendered to me at a time when I most needed them."

This paragraph upon its face clearly indicates that there was no existing contract as alleged by the petitioner in his complaint. The will distinctly refers to services previously rendered. No mention is made of an agreement to continue to render services.

When the circumstances which have been reviewed in the statement are considered in connection with this will, its evidential weight is small. At about the time that the will was procured, Neely likewise procured a deed from Mrs. Calef for her property. He admittedly reconveyed the property to her. He acknowledged over his own hand that Mrs. Calef had repaid monies to him which had caused him to retransfer the property to her. He acknowledged over his own hand four years later, that he was indebted to Mrs. Calef in the sum of $17,000.00 which he agreed to repay. He two years later, over his own hand, acknowledges that the work which he is doing for Mrs. Calef is done without any consideration.

All of these statements and acts on his part occurred after the execution of this will which, in its own terms, referred to a previous event or course of action. The will in no wise is evidential of the agreement set forth in the bill of complaint which alleged that the plaintiff had agreed to render further services. The will refers to past services alone.

Petitioner says that this will proved the contract according to the decisions of the State of New Jersey and

cites the cases of *Laune* v. *Chandless*, 99 N. J. Eq. 186, and *Kastell* v. *Hillman*, 53 N. J. Eq. 49. It is respectfully submitted that the will on its face, instead of proving an agreement for continuing services, disproves such an agreement. The cases cited by petitioner in his brief are not authorities for the holding given by the petitioner.

In *Laune* v. *Chandless*, 99 N. J. Eq. 186, the facts were dissimilar. The complainant had cared for the home of Chandless from 1906 until his death in 1922. She alleged that Chandless had agreed to leave her his property in payment of her services for caring for him. This testimony was corroborated by various witnesses. After mentioning these witnesses, Vice-Chancellor Bentley says:

> "But the oral testimony *was powerfully corroborated* by the production of an instrument purporting to be the Last Will and Testament of the decedent."

The Vice-Chancellor proceeds to discuss the will which was improperly executed, and concludes that it is corroborative testimony saying:

> "It tends to corroborate him when he produces the very instrument in question which by its terms declares it to have been done in consideration of the receipt of that benefit."

The entire decision turns upon the effect of the will as evidence and the Vice-Chancellor agrees that it is corroborative evidence.

In the instant case, the will, instead of corroborating the evidence on behalf of the plaintiff, is contradictory of that evidence since by its terms it refers to previous services and does not even mention services to be renderd.

In *Kastell* v. *Hillman*, 53 N. J. Eq. 49, a will devises to a son a farm:

> "In consideration of and for his services and assistance rendered to me in my estate by him up to the time of my decease."

Vice-Chancellor Pitney, later a member of this Court, made no such statement as alleged by the petitioner in his brief, that the paper proved the contract. He stated:

> "This clause is of itself evidence of the contract. In addition to that the parol proof is abundant."

Again, under the terms of the will in the Kastell case, there was a definite reference to services to be rendered up to the time of death which corroborated the evidence offered by the survivor.

In the instant case, the only evidence offered by Neely of the existence of a contract came from the lips of certain witnesses who differed among themselves and all of whose descriptions of the agreement differed from the contract alleged in the petition. The will itself did not even refer to a future contract. There was no evidence in the case of any contract which was precise in its terms and capable of enforcement.

The Courts of New Jersey have held repeatedly that a parol agreement to make a will must be clear, definite, unequivocal and mutual in its terms and must be clearly proven and plainly established. The reports of New Jersey abound in decisions defining the elements and quantum of proof requisite to establish an agreement between a decedent and the survivor to make a will. Of this vast number of cases, only two leading cases, which have been repeatedly cited, will be quoted.

Chancellor Megill in *Vreeland* v. *Vreeland,* 53 N. J. Eq. 387; 32 Atl. 3, specified the requisite items of proof:

> "But a parol agreement of this character, because of the situation and relations of the parties to it and

> the consequent opportunity for the perpetration of fraud, is regarded with suspicion, and, when its enforcement is sought, is subjected to close scrutiny. It must not only be mutual, but also definite and certain, both in its terms and as to its subject-matter, and it must be clearly proved. Cooper v. Carlisle and Brown v. Brown, supra. So, also, it must plainly appear that that which is alleged as part performance is referable to and was consequent upon the contracts alone, for the purpose of carrying it into effect. Eyre v. Eyre, supra; Pom. Spec. Perf., Sects. 108, 109."

In *Cooper* v. *Colson*, 66 N. J. Eq. 328, 330; 58 Atl. 337, Justice Fort, speaking for the Court of Errors and Appeals of New Jersey, says:

> "In every case, in order to take the case out of the statute on the ground of part performance, irrespective of other questions, two things are requisite. The terms of the contract must be established by the proofs to be clear, definite and unequivocal, and the acts relied on as part performance must be exclusively referable to the contract. * * * Most scrupulous care should be exercised by the courts in this class of cases, and especially where one of the alleged contracting parties is dead. An allegation of an agreement to convey is easily made, and casual conversations or jocular remarks of intent to devise or convey at death can readily be turned into serious import. * * * Such power should be exercised upon the most clear proof * * * of the contract to devise."

The indefiniteness of the contract of which proof was offered is apparent on its face. No person testified what services Neely was to render. No witness testified what bequests the decedent might make to friends and relatives. That she planned to change her will in those bequests was

admitted by Neely's own counsel to whom the news was conveyed by Neely himself (R. 87). According to petitioner's own brief, this contract was allegedly made at a time when Mrs. Calef was financially pressed. Through the death of her brother, Mrs. Calef received substantial funds. No proof is shown in the case that Mrs. Calef did not have a right to change the legacies, the amounts of the legacies or the legatees. Neely himself apparently recognized such a right because he himself arranged with Hume for a conference to write a new will.

In *Beaver* v. *Crump,* 76 Miss. 34; 23 So. 432, such a contract was held incapable of specific performance since it was elastic and uncertain and the testator, during his lifetime, had the right to either increase or diminish the residue of the estate as he wished.

The carbon copy of the will, upon which the petitioner relies so greatly, was admitted into evidence. By its terms it referred not to a future contract but to a past consideration. This was expressed in terms of gratitude rather than that of a debtor for services rendered under contract. The parol evidence on the part of the petitioner was indefinite, general and unconvincing. A precise contract was never proven. The effect of the carbon copy of the will was not to prove a contract but could be only evidential of a contract and, as stated, this evidence was contradictory of the contract charged in the bill of complaint.

It is submitted that the Circuit Court of Appeals in its decision ruled in accordance with the decisions of the State of New Jersey. There is no contradiction between the decision of the Circuit Court of Appeals and those of the local jurisdiction.

IV.

THE PETITIONER BY HIS FAILURE TO PERFORM THE ALLEGED CONTRACT HAS BARRED HIMSELF FROM ANY RELIEF.

Under this point, the petitioner has argued in a reverse construction of the opinion of the Circuit Court of Appeals, that the Circuit Court of Appeals inquired into the consideration given by the petitioner under the contract alleged.

This is an obvious misstatement of the reasoning of the Circuit Court. The Circuit Court in its opinion said:

> "Assuming, however, that there was a specific contract between the appellant and Mrs. Calef in the terms for which the appellant contends, nevertheless, his performance under that contract was not such as would entitle him to relief."

The petitioner charges that the Circuit Court of Appeals considered the sufficiency of the consideration rendered by Neely for the contract. This statement is specious, fallacious and upon its face, incorrect. The Circuit Court was not considering the consideration to be given by Neely but rather whether he on his side had performed the contract. It is axiomatic that the right to the relief of specific performance, or in the nature of specific performance, rests in the sound discretion of the Court of Equity. It will be granted only when the party seeking such relief comes into the court with clean hands and has fully performed, or is ready and able to fully perform.

> "In general a party seeking specific performance must show that he has performed, or offered to perform or is ready, able, and willing to perform, all the essential acts required by the contract" (58 C. J. 1065, Sec. 316).

See also:

Gifford v. *Barber,* 74 N. J. Eq. 352; 70 Atl. 371.
City of Newark v. *Lindsley,* 114 Atl. 794 (not officially reported).
Kobrin v. *Drazin,* 97 N. J. Eq. 400; 128 Atl. 796.
Thommessen v. *Absecan Land Co.,* 98 N. J. Eq. 696; 130 Atl. 518.
Friedlander v. *Lehr,* 99 N. J. Eq. 680; 134 Atl. 316.
Barry v. *Ruskin,* 99 N. J. Eq. 730; 133 Atl. 528.
B. & B. Inv. Co., Inc. v. *Kaufman, et al.,* 100 N. J. Eq. 411; 136 Atl. 186.
Pileggi v. *Thorn,* 100 N. J. Eq. 585; 135 Atl. 796.
Kutschinski, et al. v. *Thompson, et al.,* 101 N. J. Eq. 649; 138 Atl. 569.
Merlis v. *G. & M. Corporation,* 143 Atl. 139 (not officially reported).
Acquackanonk Building & Loan Association v. *Parsonnet,* 107 N. J. Eq. 48; 151 Atl. 865.

The Circuit Court of Appeals found that Neely had not fully performed the contract, which he alleged existed, even had such contract been actually made. It is submitted that the Court was completely justified in such determination. Neely claimed that he had a contract under which he was to care for and manage the estate of the decedent during her lifetime. At the close of the entire case, after evidence had been introduced by a public accountant that Neely had closed out joint accounts and transferred the funds to his personal account so that he was enriched by the sum of $50,000.00, an order of reference was directed. Both the testimony on this order of reference and the findings of the master are contained in the record. The testimony covers nearly four hundred pages (R. 737 to R. 1112). During the course of this testimony, it developed that Neely had sold securities of Mrs.

Calef and placed the proceeds in his own account; that he had borrowed monies from her to the extent of at least $17,000.00 and used them for speculation; that he had taken other securities of hers and transferred them to his individual accounts. It was conclusively shown that before she died and while she was in her last illness, he closed out various joint accounts and deposited in his personal account the sum of $50,000.00 and made no endeavor, in accordance with the order of the Court, to account for monies and assets which he had received from Mrs. Calef.

This was found by the Special Master in his report (R. 1113 to R. 1137). The Trial Court, it is respectfully submitted, necessarily found in the light of this report that there had been a breach by Neely of his obligation under the contract. The Circuit Court of Appeals affirmed the Trial Court and quoted with approval the statement by Vice-Chancellor Ingersoll in *Danenhauer* v. *Danenhauer*, 105 N. J. Eq. 449, 451, that a complainant might be afforded relief by equity by enforcing a parol contract in the instance of one who has completely performed, but that such a remedy is granted only to one

> "* * * who, induced by the agreement, has in good faith so performed it as to irretrievably change the situation of the parties to his disadvantage, to permit the other party to refuse fulfillment upon his part."

If, in the instant case, there was any contract, this contract has worked to the enrichment of the petitioner to the detriment of the estate. Petitioner, as a result of this contract, according to the master, is in possession of funds of the estate in the amount of $41,000.00 for which he has not accounted. The Circuit Court of Appeals acted in accordance with the evidence and properly affirmed the determinations of the Trial Court.

V.

THE EXISTENCE OF THE CONTRACT WAS IN ISSUE AND WAS PROPERLY DETERMINED IN THE COURTS BELOW.

The petitioner argues strenuously that because the Trial Court had stricken that part of the respondent's answer which denied the existence of the contract upon a motion based upon statements made in a brief in a separate action, that the issue of the contract was removed from the cause.

It is submitted that such an argument is erroneous. The petitioner bore the burden of proving his case which in the first instance depended upon the existence of the contract which he had pleaded. The terms of this contract were important. The petitioner fully recognized this obligation and in the trial of the cause proceeded to call some twenty witnesses. At the close of the petitioner's case, a motion to dismiss the complaint was made. This motion was based upon the failure to prove in a requested manner the existence of a parol agreement (R. 466). The Court interrupted counsel in the argument and said:

> "There was nothing in their testimony to show that there was a contract to make a will, was there?" (R. 472).

The Court further said in the argument:

> "The details of the agreement do not appear in the testimony of any witness" (R. 473).

At the close of the argument the Court stated that on examination of the cases, he might change his view but at the time the motion was denied (R. 476). The defendants then proceeded to call some fourteen witnesses who offered evidence that negatived the existence of the contract or testified directly to statements by either Mrs. Calef or Neely to the effect that there was no contract.

The entire case was fully tried upon the issue of the existence of a contract and its performance. It is true, there later developed the question of good conscience on the part of the petitioner. This, however, also entered into the performance of the contract. The records show that there was no objection to the offer of testimony by the defendants negativing the existence of the contract. The question of the previous order was fully discussed by the Trial Court on various occasions. The Circuit Court of Appeals referred to a fifty page discussion (R. 1633 to R. 1683). From the record itself, the Trial Court said:

> "I ruled against the proposition but I didn't rule that there wasn't such evidence before the court."

The Court explicitly stated at R. 1633:

> "I think there was one phase of the matter that I remember reversing."

There had also been a previous discussion in which the Court said:

> "It seems to me I reversed myself in that" (R. 1558).

By the record, the Court clearly stated its intention to reverse the order made. This intention was carried out by the Trial Court as stated by the Circuit Court of Appeals. As heretofore argued in this brief, the order was erroneous. The Trial Court at the time of judgment corrected this error. This act was completely within the authority of the Court.

In 64 C. J. 1266, it is said:

> "In a proper case, the court may amend, correct or otherwise change its findings and conclusions on its own motion."

Such action of the Court finds authority in Beck v. Occidental Life Insurance Co., 95 F. 2nd 935. The Circuit Court of Appeals of the Tenth Circuit stated that:

> "A court has power to correct a manifest error or a plain mistake of serious nature inhering in a previous decision."

In Messenger v. Anderson, 225 U. S. 436, 443; 36 L. Ed. 1153, this Court said:

> "That the phrase, 'law of the case', merely expresses the practice of courts generally to refuse to reopen what has been decided, and not a limit to their power."

It is to be remembered that in the instant case the trial was in the equity branch of the Court. The Court had, at all times, until judgment therein complete power and control over the case. The Court on its own statement asserted its right to reverse the previous order. The case was tried on the issue of the existence of the contract. The petitioner proceeded affirmatively to offer proof and endeavored to substantiate its existence and cross-examined the witnesses offered by the respondent on this issue.

It is respectfully submitted that the Trial Court corrected its error properly and without harm or prejudice to the petitioner.

VI.

THE PETITIONER FAILED TO PROVE THAT A REFUSAL TO ENFORCE THE ALLEGED CONTRACT WOULD WORK A FRAUD UPON HIM, AND THAT THE SERVICES RENDERED WERE NOT COMPENSABLE IN A SUIT AT LAW AND SO WAS NOT ENTITLED TO RELIEF.

The petitioner argues that the Circuit Court of Appeals, when it dismissed the bill of the petitioner, acted contrary to the rule of this Court and of the sixth and tenth Circuit Courts of Appeals. Petitioner argues that there had been a change of position in eight years of continuous performance to the satisfaction of the promisor, with benefits to her from the services rendered by the petitioner.

Some review of the facts in the statement is again necessary. Neely had been through bankruptcy three times before he met Mrs. Calef. At the very time he met her, he was engaged in selling second hand furs, that, according to his own witnesses were not very attractive. According to the Special Master, he took up his residence with Mrs. Calef and paid his share of the expenses in the house. He assumed control of her affairs, borrowed $17,000.00 from her; took into his possession all of her securities. If he acted as financial advisor, there was no service that he rendered that was not compensable in a suit on quantum meruit. From the evidence he was an adventurer. He did not change his status in any way, except to improve it. There was no harmful change in his position. He suffered and gave up nothing. There is no proof of any services rendered by the petitioner which were not recoverable in a suit at law.

In *Cooper* v. *Colson*, 66 N. J. Eq. 328, 58 Atl. 337, the Court of Errors and Appeals said:

> "In every case, in order to take the case out of the statute on the ground of part performance, irrespec-

tive of other questions, two things are requisite. The terms of the contract must be established by the proofs to be clear, definite and unequivocal, and the acts relied on as part performance must be exclusively referable to the contract. * * * But the mere proof of the performance of services is not sufficient. Such services may be adequately compensated for by a recovery of damages. Such services, thus performed, are of no greater efficacy to take the case out of the statute than would be a payment in whole or in part of the consideration money agreed to be paid upon a parol contract to convey land for cash.

"It must appear, to constitute ground for a decree for the specific performance of an oral agreement to convey land, founded upon alleged services, that the services were in some respects of an exceptional character and that it is obvious that the parties not only did not intend that they should be measured by ordinary pecuniary standards, but that they were of such a peculiar character that it is impossible to estimate their value by any such standard."

Applying these rules, any services which Neely is alleged to have performed, could be adequately compensated by a action at law for damages. There is no proof of any change of position on his part. He surrendered nothing. The course of his life was not changed except so far as his retention of the $40,000.00 has apparently enabled him to lead a life of ease and travel since Mrs. Calef's death.

In Boulanger v. Churchill, 86 N. J. Eq. 96, 100, 97 Atl. 947, Vice Chancellor Lewis said:

"Payment, however, is not an act which demands the specific performance of an oral contract.

"Payment in services will not, as a general rule, take the contract out of the statute any more than payment in money; but some services cannot be measured by their money value, and were not intended to

be so measured. Services of affection rendered by a child to its parent, rendered as consideration for an oral promise, cannot be compensated by money damages.

"I find, however, that the case under consideration cannot be covered by this doctrine of part performance so as to take it out of the statute, and I think the complainant's remedy is on the quantum meruit. Cooper v. Colson, et al., 66 N. J. Eq. 328.

"A decree dismissing the bill is accordingly advised."

In Cochrane v. McEntee, 51 Atl. 279, 280 (not officially reported), Vice Chancellor Emery says:

"* * * The consideration on the part of the plaintiff, according to her own account, was simply the advance of money, and it is familiar law that the mere payment of money on one side as part of the consideration is not such a part performance of a parol contract to convey lands as will entitle a court of equity to decree specific performance. Pom. Spec. Perf. Cont., Secs. 102, 103; Campbell v. Campbell, 11 N. J. Eq. 268, 270. And the case does not come within the principle of Kastell v. Hillman, 53 N. J. Eq. 49, 30 Atl. 535, and other cases cited, where specific performance has been enforced of contracts to devise or convey lands made in consideration of services or other acts or benefits rendered directly to the promisor, and which could not be measured by a pecuniary standard. Pom. Eq. Jur., Sec. 114. Even taking the complainant's own statement as sufficient proof of the circumstances of the original receipt of the money by the father, it seems to me clear that she has no right, by reason of the advances, to the conveyance of any interest in the lands, or to have the debt, or any portion of it, charged on the land. The defendant, denying the agreement

> alleged by complainant, claims to have established that the father, subsequent to these alleged advances by complainant, assisted her and supported her, with her family during her husband's absence, to an extent sufficient to pay any obligation for money borrowed by him. But, without disposing of this issue, and taking the complainant's case on this part as presented by her own evidence, I reach the conclusion that on the claim to be a creditor of her father she has shown no case for relief in this court in reference to the lands in question."

Under the established rule in the jurisdiction of New Jersey, Neely's right to specific performance or relief in the nature of specific performance depended upon proof that he had performed a type and character of services which could not be compensated in an action at law. He admittedly made no improvements to the real estate of another. He admittedly not only received back all monies which he advanced but was found indebted to the decedent in the sum of $41,000.00. He retained half of the profits of the stock speculations in which he used Mrs. Calef's funds. There was no change in his status.

In *Johnson* v. *Wehrle*, 9 N. J. Misc. 939, 949, 156 Atl. 229, Vice-Chancellor Backes, in dismissing such a bill said:

> "It is felt that this hard-working worn-out old woman found surcease, comfort and contentment in the home of her sister, where she was willing to be of service in the expectation of being rewarded by her rich sister, who, mayhap, held out the prospect. At all events, she did not step out of her ordinary vocation and if her work there was more arduous than in her other jobs, it is estimable by a jury. She will be left to her remedy at law. The case is ruled by Cooper v. Colson, 66 N. J. Eq. 328. The bills will be dismissed."

With some qualifications, the quotation of Vice Chancellor Backes may be applied to the petitioner. Of course, the petitioner was neither a hard working nor worn out old man. He did find surcease, comfort and contentment in the home of the decedent. He saw to it that he was amply paid for any service which he could ever claim to have rendered. He entered the home a bankrupt. He left the death bed of the decedent with $50,000.00 in cash. There is not an intimation in all the testimony that Neely's circumstances or status or position was changed or that he surrendered any personal benefit in his association with Mrs. Calef.

In *Danenhauer* v. *Danenhauer,* 105 N. J. Eq. 449, 451, 148 A. 390, Vice-Chancellor Ingersoll with approval quotes from a long line of cases and says:

> "The remedy is afforded upon the ground that it will work a fraud upon him who, induced by the agreement, had in good faith so performed it as to irretrievably change the situation of the parties to his disadvantage, to permit the other party to refuse fulfillment upon his part."

In *Lings* v. *Urquhart,* 106 N. J. Eq. 506, 508, 151 A. 391, Vice-Chancellor Lewis likewise said:

> "* * * And rightly so, for to hold otherwise would be to enable the party to such agreement, declining to perform on his part, to successfully perpetrate a fraud upon him, who, relying upon and induced by said agreement, has in good faith so performed it as to have irretrievably changed his position to his disadvantge."

The foregoing cases contain a multitude of decisions from the jurisdiction of New Jersey. This change of status mentioned in these cases is one prerequisite to

the right to relief. A careful examination and a review of the entire record compels the conclusion that Neely in no wise altered or changed his status. He surrendered or gave up nothing. He obtained a home for himself. He enriched himself with at least $41,000.00 of funds belonging to the decedent. Contrary to the statement in petitioner's brief that there had been a change of position, Neely had benefited and improved his position at the expense of decedent.

In line with the foregoing decisions and with the very decisions mentioned in the brief of the petitioner, the judgment rendered is proper. A careful reading of the opinion of the Circuit Court of Appeals reveals no passage or statement wherein its decision is predicated upon this ground that there was no change of position. Petitioner apparently claims that the Circuit Court of Appeals erred in failing to enforce the contract in the belief that the evidence brought the case within such rule. Petitioner's argument fails because its recital of the facts is palpably controverted by the evidence. If the status of Neely was in any way changed through his association with Mrs. Calef, it was to his immense betterment and increase in personal wealth. If he rendered any services, those services were of such a character that if he had not been compensated in full, he could have recovered the value thereof in an action of law. His failure to sue at law is explained by his retention of the funds of the decedent to the amount found by the Special Master.

VII.

N AN ACTION TO PROVE A PAROL CONTRACT OF A DECEDENT, CLEAR AND CONVINCING PROOF OF ITS EXISTENCE AND PERFORMANCE IS REQUIRED.

The petitioner urges that the Circuit Court of Appeals rred in its decision because it required the establishment f a case by more than a fair preponderance of the evidence. What is meant by the statement of the petitioner that his error took place despite the District Court's ruling hat the petitioner had done so, is not apparent from a horough reading of the brief. In this argument, the petiioner is guilty of deliberate distortion of the record in is brief. Petitioner states that the District Court conluded that the petitioner had proven a prima facie case nd refers to R. 476. No such statement of the Trial Court ppears at the close of the motion to dismiss the complaint. The Court stated:

> "It may be that I will, upon the examination of some of the cases change my view but at the moment, I am of the opinion that the motion should be denied and that is my order; that, of course, reserves to you the right to renew the motion at any time" (R. 476).

In connection therewith, the petitioner further asserts hat the respondents conceded that the petitioner was enitled to a decree that the contract was established and ites as authority the record from pages 1583 to 1585. Respondents' counsel stated at Record, page 1585: "There are several reasons why this contract, if it was found to exist, could not be enforced". This discussion took place, it will be noted, at the argument on the requested findings. The charges made that the Circuit Court imposed an extraordinary and additional burden of proof are refuted by

reference to the opinion of the Circuit Court. The Circuit Court stated:

> "Was the learned District Judge in error in holding that the appellant had not sustained the heavy burden placed upon him under circumstances such as those at bar of showing by clear and convincing proof the existence of the contract referred to and the appellant's performance thereunder?" (R. 1730).

No extraordinary burden was placed upon the petitioner by the Circuit Court. The rule applied by the Circuit Court has been laid down without variance in a long line of cases in the jurisdiction of New Jersey. Neely, the petitioner, according to the decision of the District Court Judge, was entitled to little credence. The evidence of his own witnesses including lawyers and friends indicated that there was no contract but merely appreciation on the part of Mrs. Calef.

Statements by Neely to a banker, to a man of all work and to a contractor that his association with Mrs. Calef was grounded upon his expectation that out of gratitude, she would bestow upon him something valuable. Neely, himself, throughout the trial was guilty of repeated contradictions. His own witnesses contradicted each other. Neely's own letters destroyed his story. This evidence was completely unsatisfactory and insufficient to furnish a basis for a decree which would establish a contract in his favor.

In the case of Burdick v. Grimshaw, 113 N. J. E. 591, Vice-Chancellor Lewis, after reviewing numerous authorities, said:

> "Sight, however, must not be lost of the fact that parol agreements of that character are not looked upon with favor by the courts. Vreeland v. Vreeland, 53 N. J. Eq. 387, 32 A. 3; Burrell v. Middletown, 72 N. J. Eq. 774, 65 A. 978, affirmed 73 N. J. Eq. 741,

70 A. 1100. Such is but the natural result of the fact that they are easily fabricated and most difficult to disprove, since they most usually are not brought into controversy until after the grim reaper has intervened and forever hushed the voice of the alleged promisor. Moreover, they afford unlimited opportunity, with but little danger of detection, to unscrupulous persons, intent upon the pillage and spoliation of decedent's estates, for the perpetration of fraud and the wrongful diversion of a decedent's property from those to whom it otherwise naturally would have passed. It is because of these facts that the courts have come to regard this class of oral agreements with grave suspicion, have subjected them to close scrutiny, and have allowed them to stand only when established by evidence that is clear, cogent, and convincing, leaving no doubt with respect to their actual making and existence."

Judge Biggs in the opinion of the Circuit Court of Appeals cited the opinion by the Court of Errors and Appeals of New Jersey in Cooper v. Colson, 66 N. J. E. 328, 333, in which Justice Fort said:

"Most scrupulous care should be exercised by the courts in this class of cases, and especially where one of the alleged contracting parties is dead. An allegation of an agreement to convey is easily made, and casual conversation or jocular remarks of intent to devise or convey at death can readily be turned into serious import * * * such power should be exercised upon the most clear proof * * * of the contract to devise * * *".

Further cases in the State of New Jersey to the same effect are:

Cooper v. Carlisle (Court of Errors and Appeals), 17 N. J. Eq. 525.
Vreeland v. Vreeland, 53 N. J. Eq. 387; 32 Atl. 3.
McTague v. Finnegan, 54 N. J. Eq. 454; 35 Atl. 542.
Cooper v. Colson (Court of Errors and Appeals), 66 N. J. Eq. 328; 58 Atl. 337.
Haberman v. Kaufer, 70 N. J. Eq. 381; 61 Atl. 976.
Laune v. Chandless, 99 N. J. Eq. 186; 131 Atl. 634.
Weyer v. Weyer, 106 N. J. Eq. 506; 151 Atl. 391; affirmed 109 N. J. Eq. 131; 156 Atl. 377.
Scott v. Beola, 111 N. J. Eq. 215; 161 Atl. 822.
Johnson v. Wehrle, 9 N. J. Misc. 939; 156 Atl. 229.
McNamara v. Bohn, 108 Atl. 764.

The very words "greater weight" and "preponderance of proof" indicate a heavy burden. When the Circuit Court of Appeals used heavy burden, it did so advisedly. The cases with uniformity declare that the quality of proof must be clear and convincing. This quality was particularly lacking in the instant case.

CONCLUSION.

The six specifications of errors have been discussed. It is respectfully submitted that in each specification urged by the petitioner, not only was there no error, but there was strict compliance with the existing decisions.

There are in addition to the reasons which have been discussed further full and sufficient reasons why the judgment of the Circuit Court of Appeals should not be disturbed. The Circuit Court of Appeals in its conclusions did not rest its judgment alone upon the reasons of which complaint is made by the petitioner. In the last paragraph of its opinion, the Circuit Court offers further grounds.

Because the petitioner had charged that Mrs. Calef had agreed to make him residuary legatee after certain un-

specified bequests, the Circuit Court held that "the terms of the alleged contract are not sufficiently specific to permit its enforcement" (R. 1733). This objection was extended to the prayer of the bill of complaint to impose a trust upon the entire estate.

The Circuit Court further found that the petitioner was entitled to no relief because he had failed to come into court with clean hands, "in the light of the record in the case at bar, we are convinced that the appellant does not come into court with clean hands."

Since the issues in the case at bar are peculiarly local and involve the state decisions which were applied; since no decisions hold that a contract is judicially admitted by an argument in a brief in a distinct and separate cause of action; since in accordance with the decisions of the Courts of New Jersey, the Circuit Court of Appeals properly held that the contract terms were not precisely established; since adequacy of consideration was not considered but the apparent and evident failure of the petitioner to perform the alleged contract was determined; since the Trial Court corrected an erroneous order, and this action was approved by the Circuit Court of Appeals; since the petitioner offered no proof that he had changed his position but by the evidence had benefited at the expense of the decedent and her estate; since the rules of the quality and quantum of proof, as defined by the decisions of the Courts of New Jersey, were applied; and since the Circuit Court of Appeals for additional reasons, of which no complaint is made by the petitioner, affirmed the judgment of the District Court, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

THEODORE D. PARSONS,
FRANK F. GROFF,
Counsel for Respondents.